

IN THE SENATE OF THE UNITED STATES.

JUNE 4, 1858.—Ordered to be printed.

Mr. POLK made the following

REPORT.

[To accompany E. H. S. 438.]

The Committee on Claims, to whom was referred the claim of Joseph Clymer, have had the same under consideration, and now beg leave to report:

On the 7th day of January, 1851, Lieutenant Colonel Swords of the quartermaster's department, published the following advertisement:

QUARTERMASTER'S OFFICE,
St. Louis, Mo., January 7, 1851.

Sealed proposals will be received at this office, corner of Washington avenue and Second street, until the 15th day of February next, for the transportation of army supplies to the places named below, for two years, commencing on the 1st of May, 1851:

Annually.

To Fort Kearney, on the Platte, fifty-four tons and upwards.

To Fort Laramie, eighty tons and upwards.

To Fort Mackay, at the crossing of the Arkansas, Santa Fé trail, fifty-four tons and upwards.

To Fernando de Taos, New Mexico, thirty tons and upwards.

To Santa Fé, one hundred and thirty tons and upwards.

To Albuquerque, New Mexico, fifty-seven tons and upwards.

To Doña Ana, New Mexico, thirty tons and upwards.

To Paso del Norte, New Mexico, one hundred and seventy tons and upwards.

Separate proposals will be received for each of the above routes, or bids may include two or more; but in each case the contractor will be required to bind himself to receive at Fort Leavenworth, at any time during the months of May, June, and July of each year, such army stores, whether of clothing, subsistence, ordnance, or other government property, which may there be delivered to him or his agent, suitably packed and prepared for transportation, to be by him delivered in like good order at the place or places agreed upon.

It is distinctly understood that the above specified quantities are

the minimum, and every contractor should be prepared to carry larger quantities, of which due notice will be given.

The bids will state the price for the transportation of every hundred pounds, and every bid must be accompanied by the guarantee of some responsible person as to the good faith and ability of the bidder for the performance of the contract.

The privilege is reserved to reject any or all the bids, if deemed to the public interest to do so.

No transfer or assignment of bids will be admitted or recognized; and no bid will be accepted from any individual or firm, if he or they put in more than one bid.

THOMAS SWORDS,
Lieut. Col., Quartermaster U. S. A.

On the 15th of January, 1851, Colonel Swords enclosed a copy of this advertisement to Mr. Clymer, and Mr. Clymer made a bid which was the lowest offer for transportation to two of said posts, and it was therefore accepted in a letter of the 15th July, 1851; and Clymer was also invited in the same letter to take the transportation to the other posts also; he did so, and the agreement made between the parties was afterwards, on the 18th April, 1851, formally reduced to writing, and is as follows:

Articles of agreement made and entered into at St. Louis, the eighteenth day of April, A. D. one thousand eight hundred and fifty-one, between Lieutenant Colonel T. Swords, quartermaster United States army, of the one part, and Joseph Clymer, of the State of Missouri, of the other part.

This agreement witnesseth, that the said Thomas Swords, quartermaster, for and on behalf of the United States, and the said Joseph Clymer, for his heirs, executors, and administrators, have mutually agreed, and by these presents do mutually covenant and agree, to and with each other, as follows, to wit:

1st. That the said Joseph Clymer shall receive at Fort Leavenworth, on the Missouri river, at any time between the first day of May and the thirty-first day of July, in each of the years one thousand eight hundred and fifty-one, and one thousand eight hundred and fifty-two, respectively, such stores, whether of clothing, subsistence, ordnance, building materials, or other property, as may be delivered to him in good order by the assistant quartermaster, or other agent of the quartermaster's department at Fort Leavenworth, and shall transport them with all despatch, and deliver them in like good order and condition to the quartermaster or assistant quartermaster at El Paso, in the State of Texas, Dona Ana, Don Fernando de Taos, in the Territory of New Mexico, according to the instructions he may receive from the assistant quartermaster at Fort Leavenworth at the time the stores to be transported may be delivered to him.

2d. That the said Joseph Clymer shall transport such above mentioned stores as may be delivered to him for transportation in good strong wagons, well covered with two new substantial duck covers, no wagon to be loaded with more than five thousand pounds, (in addition

to the provision of the teamster, and each wagon to be drawn by six yoke of good strong cattle, or five pairs of good strong mules.

3d. That all the means of transportation to be used by said Joseph Clymer under this agreement shall be submitted to the assistant quartermaster at Fort Leavenworth for his inspection, and such only shall be used as he may accept as fit for the trip.

4th. That the said Joseph Clymer shall employ at least one man, in addition to the teamsters, for every five wagons in each train, each man to be well armed and equipped, and provided with ammunition.

5th. That the said Joseph Clymer shall have a train in readiness to receive freight and to start from Fort Leavenworth at any time between the first day of May and the thirty-first day of July, in each of the years eighteen hundred and fifty-one and eighteen hundred and fifty-two, due notice having been previously given to him, by the party of the first part, of the amount of stores to be transported, and of the time when the train must be in readiness to start.

6th. That the said Joseph Clymer shall pay, at the rate of the first cost, to the United States, with the further amount of fifty *per centum* in addition, for any damage or deficiency, at the point of destination, in the property delivered to him for transportation, unless it shall be satisfactorily shown by the report of a board of officers, which the assistant quartermaster shall call for, that the damage or deficiency was unavoidable.

7th. That the said Joseph Clymer shall be paid out of the office of the assistant quartermaster at Fort Leavenworth at the following rates, to wit: (\$12 84) twelve dollars and eighty-four cents per hundred pounds for all freight delivered by him at El Paso, Texas; (\$12 50) twelve dollars and fifty cents per hundred pounds for all freight delivered at Doña Ana, New Mexico; (\$8 83) eight dollars and eighty-three cents for all freight delivered at Fernando de Taos, New Mexico; on his producing the receipt of the assistant or acting quartermaster of the post at which the stores are delivered for the quantity delivered, and his certificate that they were delivered in good order; or if damaged, that the damage was reported on by a board of officers, as provided for in the 6th article of this agreement.

In testimony whereof the undersigned have hereunto placed their hands and seals this eighteenth day of April, one thousand eight hundred and fifty-one.

THOS. SWORDS, Q. M. [L. s.]
JOSEPH CLYMER. [L. s.]

In presence of—

JAMES MCKAY,
WADSWORTH RAMSAY.

Under the aforesaid advertisement and contract, freight was furnished by the United States to the claimant, and transported by him to about the amount reserved by him in his contract, as hereinafter stated, with McCoy, Smith & Waldo. In the spring of 1852, the petitioner provided himself with all the wagons, oxen, mules, horses, provisions, and other things requisite, as well as with wagonmaster, teamsters, and men, for transporting, at least, the minimum of the freight men—

tioned in the advertisement. And while thus fully prepared, he was notified by Major Ogden, assistant quartermaster at Fort Leavenworth, on the 6th of April, 1852, that no stores would be furnished him for transportation, under his contract, during the then coming season. The petitioner immediately informed the quartermaster that he had prepared a train of 30 wagons, and 192 yoke of oxen, and all other things necessary to enable him promptly and fully to transport the freight according to the contract, and that he would be subjected to a heavy loss in consequence of the freight not being furnished him for transportation; and that he would look to the government for indemnity. Accordingly, in due time, and so soon as practicable, the claim of petitioner was presented to the Court of Claims, which held that, upon the *law* of the case, the advertisement did not constitute a part of the contract entered into between the claimant and the United States, and consequently that the relief asked by the petitioner could not be reported in favor of by the court. Yet the court present the facts of the case as constituting an appeal to the equity and sense of justice of Congress. A majority of the committee think that that clause of the fifth article of the contract which requires that due notice should be previously given to claimant by the United States of the amount of stores to be transported, has direct reference to the portion of the advertisement which says: "it is distinctly understood that the quantities thereinbefore named, to wit: to Fernando de Taos, 30 tons and upwards; to Doña Ana, 30 tons and upwards; and to Paso del Norte, 170 tons and upwards, are the minimum, and every contractor should be prepared to carry *larger quantities*, of which due notice will be given;" and if so, then the notice to be given would only refer to the excess of freight to be transported, over and above the minimums named in the advertisement. Indeed, it is evident that if the United States by the contract were under no obligation to furnish any amount of freight to be transported by the claimant in the summer of 1852, then the clause of the contract quoted above is entirely superfluous.

But it is submitted that whatever may be the hard law of the case, there can scarcely be a doubt but that the claimant understood that the government was bound to furnish him at least the minimums of freight mentioned in the advertisement on the one hand, and that he was also bound to carry the same between the points therein named on the other. And the claimant accordingly prepared himself fully to meet this obligation. And having made such preparation, and being ready and willing to transport the freight, of course he was subjected to damage and loss by the failure of the United States to furnish it. Against such loss actually sustained by the claimant while faithfully discharging his duty, and without any fault on his part, the committee think he ought to be indemnified, especially when such damage has seriously injured, if not broken him up.

The claimant made a contract with Smith, McCoy & Waldo, by which he granted to them the transporting of the thirty tons to Doña Ana, and of 190,000 pounds of the 170 tons to Paso del Norte, and he claims damages for the failure of the government to furnish this amount of freight. Your committee report against allowing

anything to the claimant on account of the freight which he contracted with McCoy, Smith & Waldo to transport. The claimant is not shown to have made any preparation to transport this freight, and of course it cannot be said that he has been damnified by any failure to furnish it.

But it is shown that he did fully prepare himself, at a heavy cost, to transport the 60,000 pounds to Taos and 150,000 pounds to El Paso, and was ready and willing to do so in accordance with the advertisement and contract aforesaid. And they think that justice requires that the claimant should be put into the same condition he would have been in if the freight had been transported and paid for according to the contract rates. This will be arrived at, in their opinion, by calculating the amount the transportation would come to at the contract rates, and adding thereto the amount realized by the claimant by the sale of his outfit, and then by deducting therefrom all the expenses of transportation, including value of oxen and wagons, hire of hands, provisions, &c. The amount of transportation would be as follows :

One hundred and fifty thousand pounds to El Paso, at	
\$12 84 per hundred	\$19,260 00
Thirty tons, or 60,000 pounds to Taos, at \$8 83 per	
hundred.....	5,298 00
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Making an aggregate of	24,558 00
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When the freighting for 1852 was broken up by the government failing to furnish anything to be transported, the claimant had his outfit of wagons, oxen, mules, horses, provisions, and all other necessities, in the country beyond the Missouri border, and was compelled to make sale of them there, and under such circumstances as must, of necessity, have entailed a heavy sacrifice. They were sold to the best possible advantage, and yielded only the sum of \$5,437, which, added to the amount of transportation, gives the sum of \$29,995.

Nathan H. McKinney, whose testimony was taken in the case, testifies that he had the charge of claimant's trains during the summer and fall of 1851, and had the general control of the trip to El Paso and Doña Ana; and also had like charge and control in 1852 until the business of that season was broken up by the United States failing to furnish the freight to be transported. He was, therefore, in a condition to know accurately the expense of transporting the freight. He fixes this amount at \$14,325, which, deducted from the last named sum, leaves a balance of \$15,670; and this balance your committee set down as the amount necessary to make good to the claimant the loss sustained by him by reason of the failure by the government to furnish freight to him in 1852. They think, therefore, that that amount ought to be refunded to the claimant, and report a bill accordingly.

